SRI GANESH JAYA BALAN v. PP & ANOTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
LAU BEE LAN JCA
RAVINTHRAN PARAMAGURU JCA
SUPANG LIAN JCA
[CRIMINAL APPEAL NOS: B-05(M)-120-03-2019,
B-05(SH)-121-03-2019 & B-05(SH)-145-03-2019]
6 DECEMBER 2021

Abstract – *In a drug trafficking case, merely proving the element of physical custody without showing further the mental element of knowledge equates to failing to prove possession and is fatal to the charge. Hence, the learned trial judge in this case erred when, after accepting the appellant's defence that he had no knowledge of the existence of the drugs, concluded nonetheless that the appellant was in 'passive possession' of the offensive drugs. The appellant ought not to have been found guilty of the charge; he ought to have been acquitted and discharged.*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused persons each carried bag containing 3,024g and 7,033g of cannabis – First accused convicted for offence under s. 39B(1)(a) of Dangerous Drugs Act 1952 ('DDA') and sentenced to death – Second accused convicted for offence of possession under s. 39A(2) of DDA and sentenced to ten years imprisonment and ten lashes of whip – Whether first accused in actual possession of drugs – Whether second accused had knowledge of drugs – Whether conviction and sentence of accused persons safe*

CRIMINAL PROCEDURE: *Sentence – Appeal – Appeal against sentence – Accused carried bag containing 7,033g of cannabis – Accused convicted for offence of possession under s. 39A(2) of Dangerous Drugs Act 1952 and sentenced to ten years imprisonment and ten lashes of whip – Whether sentence adequate in view of weight of cannabis accused found to be in possession of*

The police arrested two men at a condominium, following information received that a certain drug trafficking activity was going to take place. The men each carried a bag. The bag carried by one man ('first accused'), a Malaysian, was found to contain 3,024g of cannabis and his boarding pass while the bag carried by the other man ('second accused'), a Sri Lankan, was found to contain 7,033g of cannabis and his Sri Lankan passport. The accused persons were each charged at the High Court for trafficking in dangerous drugs, an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). Satisfied that the prosecution had established a *prima facie* case, the trial judge called the accused persons to enter their defence. According to the accused persons, (i) the second accused was staying at the first accused's condominium; (ii) the first accused had met up with his friend

('Obama') at a restaurant as the latter wanted to repay his debt; (iii) Obama had two bags with him and he requested for the first accused to bring him to the condominium to wait for a friend who would bring the money; (iv) upon arrival at the parking lot, the first accused requested for the second accused to come down from the eighth floor; (v) Obama told the first accused that he would return with the money and left; (vi) when the second accused arrived at the parking lot, they each carried Obama's bags; (vii) they were arrested at the lobby of the condominium; and (viii) the first accused saw Obama standing across the road and informed the police about this but the information was ignored. At the conclusion of the defence case, the first accused was found guilty for the offence and convicted as per the charge and sentenced to death. The second accused, who was said to have been involved for a brief moment only and lacked knowledge of the drugs, was convicted for the offence of possession under s. 39A(2) of the DDA and sentenced to ten years imprisonment and ten lashes of the whip. Hence the present appeals by (i) the first accused against his conviction and sentence on the grounds that (a) the trial judge erred in finding that the first accused was in actual possession of the drugs and that the accused persons attempted to flee upon realising the presence of the police; (b) the boarding pass was not listed in the search list; and (c) the trial judge had found *prima facie* evidence that both accused persons had *mens rea* possession and it was an affirmative finding of possession without the aid of presumption in s. 37(d) of the DDA. However, at the end of the case for the defence, the trial judge acquitted the second accused of the charge of trafficking but nonetheless convicted him of possession under s. 6 read together with s. 39A(2) of the DDA as the latter was said to lack knowledge; (ii) the second accused against his conviction and sentence; and (iii) the prosecution against the sentence meted out against the second accused on the ground that it was inadequate in view of the weight of the cannabis that he was found to be in possession of.

Held (dismissing appeal by first accused and prosecution; allowing appeal by second accused)

Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The trial judge made a finding that the first accused was in actual possession of the drugs as opposed to presumptive possession. His Lordship did not find the first accused to be in possession merely because he attempted to flee. The police officer ('SP3') said a strong smell of cannabis emanated from the bag that he was carrying. The trial judge also considered that the first accused appeared to be shocked when SP3 flashed his police authority card. The reaction of the first accused was held to conduct which was admissible. In respect of the issue of custody, the first accused was spotted carrying the bag which contained the drugs at the time of his arrest. The cannabis found in the bag carried

by the first accused was properly marked and sent for analysis without there being a break in the chain of evidence. In the premises, the trial judge correctly drew the inference of knowledge on the part of the first accused. (para 18)

(2) There was overwhelming evidence for the trial judge to make an affirmative finding of possession of the drugs in question by the accused persons. They both looked shocked and attempted to run but were arrested. At the time of the arrest, the bags were on their persons and SP3 said the smell of cannabis from the bags was strong. This even if the benefit of doubt was given to the first accused and it was held that the boarding pass was not found in the bag, the finding of possession by the trial judge based on the other evidence was unassailable. In other words, the mistake of the raiding officer, in not recording the boarding pass, did not result in a gap in the prosecution's case. (para 22)

(3) The finding of the trial judge that there was lack of knowledge at the end of the defence case applied solely to the second accused. The main reason for this finding was the acceptance of his defence that he merely carried the bag for a short while from the parking lot to the lobby because the first accused, with whom he was staying, requested him to do so. The argument that the finding of possession against the first accused was 'neutralised' when the second accused's defence that he had no knowledge was accepted by the trial judge was without merit. (paras 25 & 26)

(4) Under the DDA, the prosecution could also rely on statutory presumption to prove knowledge once physical custody is proved. However, in the instant case, the trial judge found that the prosecution proved possession without the aid of the presumption in s. 37(d) of the DDA. That was the reason the trial judge used the term 'direct evidence' with respect to possession when calling for the defence of the appellants. However, once the trial judge made a finding that the second accused had no knowledge of the contents of the bag, the mental element that was essential for the office of possession ceased to exist. What remained would be the element of physical custody which was not sufficient to prove possession in law. There was much merit in the second accused's submission that the trial judge erred in convicting him for the offence of possession under s. 39A(2) of the DDA. (paras 45 & 47)

(5) The conviction and sentence of the first accused, as pronounced by the High Court, was affirmed. The trial judge committed an appealable error in convicting the second accused for the offence of possession after finding that he lacked knowledge. The conviction and sentence against the second accused were set aside and substituted with an order for acquittal. (paras 48 & 49)

Case(s) referred to:
Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***
Konradt Prosch v. PP [2020] 1 LNS 2065 CA ***(refd)***
Letitia Bosman v. PP (No 2) [2020] 8 CLJ 252 FC ***(refd)***
Ong Ah Chuan v. PP [1980] 1 LNS 181 PC ***(refd)***
PP v. Mohamed Ali [1962] 1 LNS 129 HC ***(refd)***
Rossarin Nuekaew v. PP [2017] 8 CLJ 503 FC ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Yahya Hussein Mohsen Abdulrab v. PP [2021] 9 CLJ 414 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 402B(2), (6)
Dangerous Drugs Act 1952, ss. 6, 37(d), (da), 39A(2), 39B(1)
Evidence Act 1950, s. 8

(Criminal No: B-05(M)-120-03-2019)
For the appellant - Geetham Ram Vincent & Aliff Bolkin; M/s Geethan Ram
For the respondent - Mohd Dusuki Mokhtar & Mohd Azmi Mashud; DPPs

(Criminal No: B-05(SH)-121-03-2019)
For the appellant - Hisham Teh Poh Teik, Kee Wei Lon & Low Wei Loke; M/s Teh Poh Teik & Co
For the respondent - Mohd Dusuki Mokhtar & Mohd Azmi Mashud; DPPs

(Criminal No: B-05(H)-145-03-2019)
For the appellant - Mohd Dusuki Mokhtar & Mohd Azmi Mashud; DPPs
For the respondent - Hisham Teh Poh Teik, Kee Wei Lon & Low Wei Loke; M/s Teh Poh Teik & Co

[Editor's note: For the High Court judgment, please see PP lwn. Sri Ganesh Aya Balan & Satu Lagi Kes [2019] 1 LNS 2073 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JCA:

[1] There are three appeals before us. They arise from two criminal cases that were jointly tried.

[2] In Criminal Trial No. BA-45A-128-12-2017, Sri Ganesh a/l Jaya Balan ("Sri Ganesh") was convicted under s. 39B(1) of the Dangerous Drugs Act 1952 and sentenced to death. The charge against him read as follows:

> Bahawa kamu pada 26/4/2017 pada jam lebih kurang 10.20 malam bertempat di pintu lobi blok A, Impian Meridien, Jalan Subang 1, USJ 1, Subang Jaya Selangor, di dalam daerah Petaling Jaya, di dalam Negeri Selangor telah memperedarkan dadah berbahaya disyaki Cannabis anggaran berat 3,024 gram. Oleh itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[3] In Criminal Appeal No. B-05(M)-120-03-2019, he has appealed against the said conviction and sentence.

[4] In Criminal Trial No. BA-45A-141-12-2017, Agnish Gajanan Balasundrampillai ("Agnish") was charged as follows:

> Bahawa kamu pada 26/4/2017 pada jam lebih kurang 10.20 malam bertempat di pintu lobi blok A, Impian Meridien, Jalan Subang 1, USJ 1, Subang Jaya Selangor, didalam daerah Petaling Jaya, didalam Negeri Selangor telah memperedarkan dadah berbahaya disyaki Cannabis anggaran berat 7,178 gram. Oleh itu kamu telah melakukan suatu kesalahan dibawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah Seksyen 39B(2) Akta yang sama.

[5] However, at the conclusion of the trial, he was convicted of the offence of possession under s. 39A(2) of the Dangerous Drugs Act 1952 and sentenced to ten years imprisonment and ten lashes of the whip. In Criminal Appeal No. B-05(SH)-121-03-2019, Agnish has appealed against the conviction and sentence.

[6] In Criminal Appeal No. B-05(H)-145-03-2019, the Public Prosecutor has appealed against the alleged inadequacy of the sentence meted out to Agnish. The Public Prosecutor did not appeal against the order of acquittal on the trafficking charge.

Case For Prosecution

[7] On 26 April 2017 at about 10pm, SP3 (ASP Mohd Syaipul Rizal) from Narcotics Division of the Subang Jaya District Police Headquarters led a team of police officers to the Impian Meridien Condominium at Jalan Subang after receiving information about drug trafficking activity. At 10.20pm he observed two men walking towards the compound of the condominium. Each of them carried a sling bag. SP3 followed them to the lobby of block A of the condominium. At the lobby, SP3 introduced himself as a police officer and showed them his authority card. Both men appeared startled and attempted to run away. A scuffle followed with the other members of the raiding team who successfully subdued and arrested them. They were identified as Sri Ganesh (referred to as the first accused during the trial) and Agnish (referred to as the second accused). Sri Ganesh is a Malaysian citizen whereas Agnish is a Sri Lankan citizen. SP3 said that Sri Ganesh carried a blue-black sling bag with the writing "Silver Star" and the picture of a red car. The bag that Agnish carried was a black bag with the brand name "Lenovo".

[8] Upon checking the two bags, SP3 found three slabs of dried vegetable matter suspected to be ganja and a boarding pass in the name of Sri Ganesh a/l Jaya Balan in the bag carried by Sri Ganesh. In the bag carried by Agnish, seven slabs of dried vegetable matter were found together with his Sri Lankan

passport. The exhibits and the arrested persons were handed over to the investigating officer. The exhibits from the two bags were separately marked and sent to the Chemistry Department for analysis. The chemist (SP4) issued a report stating that the substance taken from the bag carried by Sri Ganesh was cannabis with a total weight of 3,024g whereas the bag carried by Agnish contained cannabis with a total weight of 7,033g.

High Court Finding At End Of Prosecution's Case

[9] At the end of the prosecution's case, the learned High Court Judge found that a *prima facie* case had been established against both appellants. His Lordship considered the following evidence of the prosecution in respect of possession of the drugs in question. The evidence of SP3 was that he clearly observed the appellants carrying a sling bag on their shoulders immediately prior to their arrest. His Lordship noted that the evidence of SP3 was not successfully challenged. SP3 said that the drugs in question was recovered from the said bags. SP3 did not notice anyone else walking with the appellants towards the lobby prior to the arrest. Thus, His Lordship concluded that no other individual had anything to do with the drugs at the time of the appellants' arrest. Both appellants appeared shocked at the presence of the police team and attempted to run away. His Lordship found that their conduct was relevant under s. 8 of the Evidence Act 1950 to indicate guilt on their part. He also drew an inference that the appellants attempted to run upon seeing the police because the strong smell emanating from the bag indicated presence of cannabis. Based on the above evidence, the learned High Court Judge found that the prosecution had proved actual possession of the drugs in question by the appellants. As Sri Ganesh and Agnish each carried over three kilograms and seven kilograms in their respective sling bags, the learned High Court Judge invoked the presumption of trafficking afforded by s. 37(da) of the Dangerous Drugs Act 1952.

Defence Of The Appellants

[10] Both appellants gave sworn evidence. Sri Ganesh told the court that on the night in question he was at his apartment on the eighth floor of Impiana Meridien Condominium with Agnish and another friend. Agnish stayed in the same apartment. An ex-collegemate of his by the name of Obama called him to repay a debt of RM400. Sri Ganesh met him at the McDonald's restaurant in SS15, Subang Jaya at 8.30pm. Obama had two bags with him which he said contained his clothes and personal effects. He asked Sri Ganesh to bring him to the Impiana Meridien Condominium to await a friend who would bring the money to him. Upon arrival at the parking lot, Sri Ganesh requested Agnish to come down from the eighth floor with the access card. Obama told Sri Ganesh that he will return with the money and left. Sri Ganesh did not want to leave the bags in the car. He

decided to bring it to his apartment for safekeeping. When Agnish arrived at the parking lot, he asked Agnish to carry one of the bags while he carried the other one. When they reached the lobby of the condominium, they were arrested by a police team and brought to his apartment on the eighth floor. The police seized his boarding pass from the drawer of his study table. When they were brought to the ground floor later prior to being taken away to the police station, Sri Ganesh saw Obama standing across the road. He told one of the policemen about it but this information was ignored.

[11] The evidence of Agnish in respect of his movements prior to his arrest was the same as that related by Sri Ganesh. He was in the condominium when Sri Ganesh asked him to come to the parking lot with the access card. Sri Ganesh requested him to carry one of the two bags in question. He obliged as they all lived in the same apartment in the condominium. As the bag was heavy, he assumed that there was a laptop computer inside. He was arrested and handcuffed by the police when he and Sri Ganesh arrived at the lobby of the condominium complex.

Finding Of High Court At End Of Defence

[12] The learned High Court Judge noted that the claim of Sri Ganesh that the bags belonged to Obama was not put to SP3 during the prosecution's case. The defence only put to SP5 (the investigating officer) that Sri Ganesh told him about Obama and Joshua during investigation. The learned High Court Judge also disbelieved the claim of Sri Ganesh that he told the police that Obama was standing across the road from the Impiana Meridien Condominium guardhouse. His Lordship said that it is unbelievable that Obama did not flee upon witnessing the arrest of the appellants by the police. Furthermore, Agnish said in his evidence that Sri Ganesh did not tell him about the existence of Obama. And Agnish was with Sri Ganesh when the latter allegedly told police about Obama. The learned High Court Judge accepted the evidence of SP5 that Sri Ganesh never told him about Obama. His Lordship concluded that the character of Obama was fictitious. He rejected the defence of Sri Ganesh that he was an innocent carrier of the drugs. He convicted Sri Ganesh of the offence of trafficking and sentenced him to death.

[13] As for Agnish, his defence was that he was requested by Sri Ganesh to carry the bag in question when he came down to the parking lot with the access card. He had no knowledge of its contents. The learned High Court Judge said that his defence was not challenged by the prosecution when he gave evidence. Sri Ganesh also told the court that he had asked Agnish to assist him to carry one of the two bags that were in the car. The learned High Court Judge found that Agnish did not have knowledge of the contents of the bag. However, he found Agnish to be in "passive possession" of the drugs. For that reason, His Lordship found that the charge of trafficking was not

made out and acquitted him of the same. Instead, he convicted Agnish of the charge of possession under s. 39A(2) of the Dangerous Drugs Act 1952 and sentenced him to ten years imprisonment and ten lashes of the whip.

Issues In This Appeal

[14] Counsel for Sri Ganesh raised the following issues:

(i) that the learned High Court Judge made a finding of "*mens rea*" possession based on the evidence that his client attempted to flee and that there was a strong smell of cannabis;

(ii) that the learned High Court Judge failed to appreciate the "entire" line of defence of his client when he said that his boarding pass was not found in his bag at the time of arrest; and

(iii) the previous counsel of Sri Ganesh was extremely incompetent.

[15] Counsel for Agnish raised the following issues:

(i) the learned High Court Judge believed the defence of innocent carrier and therefore should have acquitted him instead of finding that he was in "passive" possession of the drugs; and

(ii) in respect of the cross-appeal by the prosecution on the sentence meted out to his client, he submitted that it was without merit.

[16] In respect of the cross-appeal on the sentence imposed on Agnish, the learned Deputy Public Prosecutor submitted that it was inadequate in view of the weight of the cannabis that he was found to be in possession which was over seven kilograms.

Grounds Of Appeal Of Sri Ganesh

[17] The first two issues raised by counsel for Sri Ganesh relate to the evidence of the prosecution to support the finding of possession against his client and the defence that there was "foul play" in respect of the case against him. We find no merit in these grounds of appeal for the following reasons.

[18] The learned High Court Judge made a finding that Sri Ganesh was in actual possession of the drugs as opposed to presumptive possession. His Lordship did not find Sri Ganesh to be in possession merely because he attempted to flee. SP3 said a strong smell of cannabis emanated from the bag he was carrying. His Lordship also considered the fact that Sri Ganesh appeared to be shocked when SP3 flashed his police authority card. The reaction of Sri Ganesh was held to be conduct which is admissible. In respect of the issue of custody, Sri Ganesh was spotted carrying the bag which contained the drugs at the time of his arrest. The cannabis found in the bag that Sri Ganesh carried was properly marked and sent for analysis without

there being a break in the chain of evidence. In the premises, the learned High Court Judge correctly drew the inference of knowledge on the part of Sri Ganesh.

[19] Counsel for Sri Ganesh argued that Sri Ganesh did not attempt to flee in the first place upon seeing the police and that the finding of the learned High Court Judge that he did so was a misdirection. The learned High Court Judge said that the appellants attempted to flee when SP3 identified himself as a police officer and had to be subdued. This finding was based on the evidence of SP3 during the examination-in-chief and cross-examination. However, in the written submission of counsel for Sri Ganesh, the following answers of SP3 that were given towards the end of the lengthy cross-examination were reproduced:

S: 40 kaki?

J: Lebih kurang

S: Adakah mereka melarikan diri ke dalam?

J: Tergesa-gesa bergerak laju

S: Bergerak lajulah?

J: Yes

S: Tapi bukan larikan dirilah?

J: Bukan

S: Merujuk kepada gambar E tuan ASP, anda telah memberi keterangan bahawa di gambar E mereka telah ditahan. Betul atau tidak?

J: Betul

S: Tolong beritahu Mahkamah bagaimana anda telah berjaya menahan mereka di kawasan gambar E?

J: Kita rujuk pada gambar E ini, tiada kawasan boleh melarikan diri disebabkan dinding yang ada di sini box ini untuk saya dan team saya tahan dan tangkap agak mudah di situ

S: Jadi anda kata mereka berhenti di situ?

J: Ya sebab halangan pintu kaca

[20] Although SP3 appears to agree that Sri Ganesh was not running away in the above excerpt, from the earlier questions it is clear that he was referring to the conduct of the appellant who hurried (tergesa-gesa) to the lobby when they were observed by the police team. It was not at the time of the raid. When SP3 flashed his authority card, they attempted to run but were unable to escape because of the glass wall at the lift area. Thus, there

A is no merit in the suggestion that the learned High Court Judge erred in finding that the appellants attempted to flee upon realising the presence of the police team.

[21] The second issue addressed by counsel for Sri Ganesh was in respect of the boarding pass. SP3 said that he found it in the bag that Sri Ganesh was
B carrying. However, he failed to list it in the search list (P10A). He also did not list the boarding pass in the "borang akuan serah menyerah (P11)" when he handed over the case to the investigating officer. In addition, the passport of Agnish which was recovered from the bag that he was carrying was not listed either. On the other hand, Sri Ganesh testified that after his arrest, he
C was taken by the police to his apartment and a search was conducted. He said the boarding pass was taken by the police from a drawer in his room. His counsel submitted that the fact that the alleged discovery of the boarding pass inside the bag in question was not reflected in the search list created a gap in the case of the prosecution and that the omission was not explained.

D **[22]** We find no merit in the above submission for the following reasons. The raiding officer (SP3) explained that the search list was not prepared at the place of arrest but at the police station. He said that he forgot to include the boarding pass in P10A and P11. The learned High Court Judge was mindful of the omission of SP3 to include both the boarding pass of Sri
E Ganesh and the passport of Agnish in P10A and P11 respectively (see para. 31 of the High Court judgment). However, having regard to the other evidence, His Lordship said that the said omission did not affect the case of the prosecution. We see no reason to disagree with the reasoning of the learned High Court Judge. There was overwhelming evidence for the learned
F High Court Judge to make an affirmative finding of possession of the drugs in question by Sri Ganesh and Agnish. They were observed for quite some time by the police team after they arrived at the parking lot. They were spotted carrying the bags in question. They both looked shocked and attempted to run but were arrested. At the time of arrest, the sling bags were
G still on their person. SP3 said the smell of cannabis from the bags was strong. Thus, even if the benefit of doubt is given to Sri Ganesh and it is held that the boarding pass was not found in the bag, the finding of possession by the learned High Court Judge based on the other evidence is unassailable. In other words, the mistake of the raiding officer in not recording the two items does not result in a gap in the case of the prosecution.

H **[23]** However, counsel for Sri Ganesh also suggested in his submission that there was "foul play" by the police in respect of the entire raid because of the glaring omission to record the boarding pass and passport in P10A and P11. Counsel for Sri Ganesh questioned the credibility of the police raiding
I team and impliedly raised the spectre of a frame-up of the appellants by the police and which possibility the learned High Court Judge allegedly ignored.

We see no error on the part of the learned High Court Judge who ignored this line of defence. The learned High Court Judge found SP3 to be a credible witness and the fact that he did not specifically mention the frame-up theory in his judgment simply means that he dismissed it outright. Whilst we acknowledge that frame-up of innocent citizens by the police cannot be discounted in some cases, the court must give weight to that defence only on credible evidence that suggests it and not on mere speculation; otherwise prosecution of criminal cases in this country would be frustrated at every turn (see *PP v. Mohamed Ali* [1962] 1 LNS 129; [1962] 1 MLJ 257). The defence of frame up by the police in the instant case is obviously not on firm ground. It is speculative and hinged solely on the omission of the investigating officer to record two articles in the search list and the "borang akuan serah menyerah". Mistakes could occur in the collection and recording of evidence. Without anything more, such mistakes do not necessarily mean that the integrity of an investigation had been compromised by dishonest police officers who are out to secure a conviction by fair or foul means.

[24] The second last ground argued on behalf of Sri Ganesh pertains to the decision of the High Court in respect of Agnish. The learned High Court Judge called for the defence of both appellants. He found *prima facie* evidence that both had "*mens rea* possession". It was an affirmative finding of possession without aid of the presumption in s. 37(d) of the Dangerous Drugs Act 1952. However, at the end of the case for the defence, he acquitted Agnish of the charge of trafficking but nonetheless convicted him of possession under s. 6 read together with s. 39A(2) of the Dangerous Drugs Act 1952. In para. 62 of his judgment, the learned High Court Judge said as follows:

> 62. Saya mendapati semasa ditangkap OKT 2 sedang berjalan dari luar kondominium menuju ke lobi kondominium seiring bersama dengan OKT1 (Mahkamah menerima keterangan SP3). Berdasarkan keterangan saksi-saksi pendakwaan dan keterangan pembelaan OKT-OKT, saya mendapati penglibatan OKT 2 dalam kes ini berlaku dalam tempoh masa yang singkat. Berdasarkan fakta dan keadaan kes ini, saya mendapati bahawa penemuan dadah di dalam beg yang disandang oleh OKT 2 adalah tidak memadai bagi menampung satu pertuduhan memperedarkan dadah, iaitu satu kesalahan di bawah Seksyen 39B Akta Dadah Berbahaya 1952. Bagi membuktikan pengedaran harus ada bukti atau inferens boleh dibuat bahawa OKT2 mempunyai pengetahuan ke atas dadah di dalam beg yang disandangnya. Saya mendapati berasaskan keterangan saksi pendakwaan dan juga pembelaan OKT2 yang disokong oleh keterangan OKT1, saya mendapati bahawa OKT2 hanya mempunyai pemilikan pasif ke atas dadah yang ditemui di dalam beg tersebut. Undang-undang adalah mantap bahawa pemilikan pasif semata-masa adalah tidak mencukupi untuk membuktikan pengedaran. Undang-undang adalah juga

A mantap, untuk bergantung kepada anggapan pengedaran di bawah Seksyen 37(da) Akta Dadah Berbahaya 1952, hendaklah wujud keterangan mengenai hal keadaan bahawa OKT2 mempunyai pemilikan *mens rea*, yang mana tidak wujud dalam kes ini. Ekoran itu saya telah meminda pertuduhan asal atas kesalahan memperedarkan dadah kepada suatu kesalahan memiliki dadah, iaitu suatu kesalahan yang boleh
B dihukum di bawah Seksyen 39(A)(2) Akta Dadah Berbahaya 1952.

[25] In the above passage, the learned High Court Judge said that Agnish did not have "*mens rea* possession". He said that Agnish lacked knowledge of what he was carrying. Counsel for Sri Ganesh argued that by this reasoning, the learned High Court Judge's finding of possession against Sri
C Ganesh had also been "neutralised" as he was also spotted carrying one of the two bags in question at the same time. We find no merit in this ground of appeal for the following reasons. Agnish gave evidence that he was requested by Sri Ganesh to carry the bag in question when he came to the parking lot to give the access card to the latter. He agreed to carry the bag
D for Sri Ganesh. He did not ask Sri Ganesh about the contents of the bag. The learned High Court Judge noted that the prosecution did not challenge his evidence in respect of his lack of knowledge as to what he was carrying. The finding of the High Court that there was lack of knowledge at the end of the defence case applied solely to Agnish. The main reason for this finding is the
E acceptance of his defence that he merely carried the bag for a short while from the parking lot to the lobby because Sri Ganesh with whom he was staying requested him to do so. This much is clear from the following sentence in the above-mentioned paragraph of the judgment:

F Berdasarkan keterangan saksi-saksi pendakwaan dan keterangan pembelaan OKT-OKT, saya mendapati penglibatan OKT2 dalam kes ini berlaku dalam tempoh masa yang singkat.

[26] Counsel for Sri Ganesh also argued that since Agnish said he did not smell anything coming from the bag, his evidence on this point is consistent with that of Sri Ganesh and for this reason, SP3's evidence should not be
G accepted. However, as we noted earlier, the learned High Court Judge in para. 62 accepted Agnish's defence that he had no knowledge of the drugs because he obliged the request of Sri Ganesh to carry the bag for a short distance. It was not because the High Court accepted the evidence of Agnish that he did not smell cannabis and made a finding of fact that SP3 lied about
H the strong smell emanating from the bags in question. Therefore, the argument that the finding of possession against Sri Ganesh was "neutralised" when Agnish's defence that he had no knowledge was accepted by the learned High Court Judge is without merit.

I

[27] The final ground of appeal was the alleged incompetence of counsel who appeared for Sri Ganesh at the trial in the High Court. In the landmark case of *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93, the Federal Court recognised that incompetence of counsel may result in a conviction being quashed as the right to be represented by competent counsel forms part of the right to a fair trial. However, the incompetence in question must be flagrant and must result in a miscarriage of justice. The Federal Court said as follows:

> In our considered judgment, the incompetence of counsel in the conduct of a defence in a criminal trial is a ground on which a conviction may be quashed provided that (i) such incompetence must be flagrant in the circumstances of the given case; and (ii) it must have deprived the accused of a fair trial thereby occasioning a miscarriage of justice. Nothing short will suffice. And in considering the question, an appellate court must have regard to the conduct of counsel as a whole and not merely to his or her failure in one or two departments. Further, in the ordinary way, a court whether at first instance or at the appellate state will of course have regard to its paramount function and duty to ensure that justice is done so that the incompetence of counsel will not factor into the equation.

[28] In the above-mentioned case, the complaint was that counsel did not put to the witnesses for the prosecution that the deceased was killed by some person other than the appellant. The Federal Court held that on the facts of the case, the suggestion was far-fetched and that it was not a case of extreme incompetence.

[29] In the more recent case of *Yahya Hussein Mohsen Abdulrab v. PP* [2021] 9 CLJ 414, the Federal Court again recognised the incompetence of counsel as a defence in a criminal case and emphasised the importance of determining whether miscarriage of justice resulted from it in the following passage:

> [44] Taking heed from high authorities, the test in all cases when considering whether there was a breach of fair trial as a result of incompetent counsel is to ask the question whether the incompetency was flagrant, such that it caused or gave rise to a miscarriage of justice. As explained by McHugh J in *TKWJ* (*supra*):
>
> > *A test such as "flagrant incompetent", while a convenient label may show that a miscarriage of justice has occurred in a particular case, is unhelpful in determining whether there has been a miscarriage of justice within the terms of s. 6(1) of the Criminal Appeal Act. Whether there has been a miscarriage of justice is the ultimate issue that the court must decide.*
>
> Thus, the focus of the inquiry by the court is not on the advocacy skills or performance of trial counsel, rather it is the acts or omissions themselves as they impact on the fairness of the trial and whether the result constitutes a miscarriage of justice. (emphasis added)

[30] In the above-mentioned case, at the trial, previous counsel for the appellant did not cross-examine prosecution witnesses on the crucial defence that the appellant was not aware of the drugs that were found inside the bag that he was carrying. The Federal Court agreed with the Court of Appeal that the previous counsel who conducted the defence at the High Court was "flagrantly incompetent". The Federal Court set aside the order for re-trial and acquitted the appellant.

[31] In the instant case, counsel for Sri Ganesh submitted that the previous counsel was incompetent for the following reasons:

(i) the defence that the bags containing cannabis belonged to Obama and that he asked Sri Ganesh to keep it for him was not put to SP3 and SP5 and thus leading the learned High Court Judge to conclude that it was an afterthought;

(ii) the cross-examination by previous counsel was "ineffective";

(iii) failure to object to incriminating evidence; and

(iv) failure of counsel to object to non-compliance with s. 402B of Criminal Procedure Code.

[32] In respect of the first reason, ie, the alleged failure to put the "ultimate" defence of Sri Ganesh that the bags belonged to Obama, we find that it is not a ground to hold that previous counsel was grossly incompetent to the extent that it resulted in a miscarriage of justice. Accused persons are at liberty to raise any defence to negate the ingredients of the offence in question. In the instant case, both accused persons were arrested while carrying the bags that contained dangerous drugs. Previous counsel for Sri Ganesh cross-examined the raiding officer (SP3) extensively in respect of his omission to record the finding of the boarding pass inside the bag carried by the former. The purpose was to negate knowledge of Sri Ganesh in respect of the contents of the bag. The investigating officer (SP5) was similarly cross-examined. The defence that Obama was the owner of the bags was not put to SP3. SP5 was only asked whether during the recording of the s. 112 statement, Sri Ganesh revealed information about any third party such as Obama or Joshua. The cross-examination of SP5 in respect of Obama was as follows:

S: Ketika OKT1 dan OKT2 dibawa kepada Insp, ada Insp buat rakaman 112?

A: Ada

S: Setuju dengan saya bahawa anda ada terima maklumat berkenaan dengan seorang pihak ketiga yang bernama Joshua?

A: Tidak setuju

S: Obama atau Siva?

J: Tidak ada

...

S: Saya cadangkan kepada anda bahawa mereka memang ada memberitahu kewujudan Obama dan juga nama Joshua kepada Insp.

J: Tidak setuju

[33] Thus, the existence of Obama was actually put to SP5 in the above excerpt although not in detail. However, SP5 emphatically denied that Sri Ganesh gave any information about Obama or other persons in his s. 112 statement in respect of the drugs seized from the bags in question. It was this reason that the learned High Court Judge found the story of Obama being the owner of the bags who gave them to Sri Ganesh for safekeeping to be a fabrication and afterthought. We find that it is not fair to blame previous counsel as extremely incompetent as the defence involving Obama was not revealed in the s. 112 statement as stated by the investigating officer. This simply means that the said defence did not exist at the time of the arrest or at the outset of the trial but was developed as the trial progressed. As we said, in any event, the investigating officer denied that any information about Obama was given to him. The learned High Court Judge's reasons for finding that the defence pertaining to Obama was an afterthought not only included the fact that it was not put to SP3 but also other reasons. It included the denial by SP5 that Obama was mentioned during the investigation and the implausibility of Obama waiting across the road when Sri Ganesh was taken away after his arrest as claimed by him. Furthermore, Agnish also said that Sri Ganesh did not tell him about Obama.

[34] The second reason for the argument that previous counsel was extremely incompetent was that his cross-examination was "ineffective". This reason was advanced because counsel for Sri Ganesh quoted excerpts from the lengthy cross-examination wherein the bench had asked counsel to rephrase or modify his questions. We have read the said excerpts. Having regard to the conduct of previous counsel in its entirety at the trial as revealed in the notes of proceeding, we see no reason to hold he was grossly incompetent merely because on a number of occasions, the phrasing of the cross-examination questions did not commend itself to the presiding judge. Suggestions by the bench in the way questions should be put or asked, is fairly common and does not indicate extreme incompetence even if the interjections are justified. As stated in *Yahya Hussein Mohsen Abdulrab v. PP* (*supra*), even if counsel is found to be wanting in the standard of advocacy, an accused person cannot complain about his conviction unless it jeopardises the right to a fair trial. The Federal Court in the said case said as follows in respect of the complaint about the standard of advocacy:

A [45] In this regard, those of us in the legal profession must recognise that there is a large influx of members of the Bar. Some are obviously more renowned than others for various reasons such as advanced experience and general access to information and network. There will always be the case where an accused person is dissatisfied with the standard of advocacy of his counsel. However, where counsel fails to abide by certain
B standards or does something another lawyer would have done differently, the accused or litigant's recourse is to the disciplinary or complaints mechanism established by law – or perhaps write a bad review. He is not otherwise entitled to use subjective or perceived notions of incompetency as a reason to complain about his conviction.

C [46] Be that as it may, in extreme cases, assessed objectively, where counsel has acted far below the accepted standard such that his flagrant incompetency jeopardises the accused person's right to a fair trial, the overall purpose of art. 5(1) of the Federal Constitution – which is to deprive life or personal liberty only according to law – would be rendered illusory. As such, in those circumstances, the just thing to do would be
D to set aside the conviction.

[35] We hasten to add that in the instant case, it was not demonstrated that the alleged "ineffective" cross-examination caused a miscarriage of justice.

[36] The third reason was failure to object to incriminating evidence. The
E investigating officer (SP5), said as follows at one point in his witness statement:

Hasil siasatan saya:

> … Saya telah merakam percakapan kedua-dua tangkapan dan tiada pendedahan dibuat tentang kewujudan atau peranan individu lain
F dalam kes ini. *Menurut mereka dadah telah diambil dari kawasan kedai berhampiran untuk disimpan di dalam rumah mereka yang terletak di unit A-11-08 kondominium yang sama.* (emphasis added)

[37] Counsel for Sri Ganesh pointed out that the above evidence should have been objected to by previous counsel. The above evidence was given
G in a witness statement. It is trite law that the statement in question of SP5 is inadmissible as it amounts to a confession after arrest by the appellants. The issue in all likelihood would have been addressed in the submissions at the end of the prosecution's case. However, the trial judge immediately pointed out that it is inadmissible and it became a non-issue thereon.
H Investigation officers are wont to say in their testimony that "as a result" of their investigation or "in the course" of their investigation, a suspect had confessed to some wrongdoing. However, such statements are not admissible. But we do not think that it would be always right to attribute extreme incompetence to counsel who does not immediately object to such
I a confession especially one that is found in a long witness statement. Such evidence, even if not objected to would remain inadmissible as a matter of

law in criminal trials. Therefore, the failure of the previous counsel to immediately object to the statement in question in the instant case, even if viewed as indicative of incompetence, could not and in point of fact did not result in a miscarriage of justice.

[38] The fourth and final reason in respect of the alleged incompetence of previous counsel was that he failed to object to the witness statements of SP3 and SP5 that were tendered at the trial. Counsel for Sri Ganesh submitted that the witness statements in question should have been objected to because they failed to comply with s. 402B of the Criminal Procedure Code as they were not served 14 days prior to the commencement of trial. In fact, the witnesses in question agreed that the said statements were prepared two days before the trial.

[39] Section 402B of the Criminal Procedure Code was inserted to expedite criminal trials by substituting oral evidence with written statements (see the decision of the Federal Court in *Rossarin Nuekaew v. PP* [2017] 8 CLJ 503). The provision in respect of service of the witness statement is not couched in mandatory language. Section 402B(2) reads as follows:

> (2) A statement **may** be tendered in evidence under subsection (1) if:
>
> (a) …
>
> (b) …
>
> (c) a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings not later than fourteen days before the commencement of the trial **unless the parties otherwise agree.** (emphasis added)

[40] It must be noted that the permissive "may" is used in this provision. Moreover, the requirement to serve 14 days before trial would not apply if "parties otherwise agree". Thus, the stipulation as to service appears to be directory and not mandatory. Even in the case of the requirement to read aloud the statement in sub-s. (6) where the imperative "shall" is used, the Federal Court in *Rossarin Nuekaew v. PP* (*supra*) held that it is directory having regard to the purpose of s. 402B which is to expedite trials. Therefore, even if previous counsel had assiduously objected to the witness statements in question, the court would not have ruled them inadmissible but may have postponed the trial to give more time to the defence or may even have ordered the witnesses to give oral evidence only. Thus, it is difficult to fathom the argument that such omission to object to the witness statements had resulted in a miscarriage of justice.

[41] In conclusion, we found no merit in all the grounds of appeal canvassed by counsel for Sri Ganesh.

A **Grounds Of Appeal Of Agnish**

[42] We shall not repeat the detailed facts in relation to the arrest of Agnish in detail. He was arrested while carrying the bag in question that contained cannabis. He offered to carry the bag in question because of the request of Sri Ganesh. Counsel for Agnish said that his client was "an innocent B momentary carrier". "Momentary" because he carried the bag from the parking lot to the lobby of the condominium. "Innocent" because he did not unzip the bag and had no knowledge about its contents. Agnish had come down to the parking lot merely to give the access card to Sri Ganesh.

C **[43]** Counsel for Agnish canvassed only one ground of appeal before us. It is this. When the learned High Court Judge called for defence of both appellants, His Lordship said that the prosecution had tendered "direct evidence" in respect of "*mens rea* possession" of the drugs. The learned High Court Judge then invoked the presumption afforded by s. 37(da) of the Dangerous Drugs Act 1952 in respect of trafficking. However, after D considering the defence of Agnish who said that he had no knowledge of the contents of the bag that he carried for Sri Ganesh, the learned High Court Judge made some crucial findings in para. 62 of his judgment. We have quoted the paragraph *in extenso* earlier. The essential point made by the learned High Court Judge is that the involvement of Agnish was for a brief E moment only as he carried the drugs from the parking lot to the lobby. Therefore, he lacked knowledge. We repeat this portion of para. 62 below:

> Bagi membuktikan pengedaran harus ada bukti atau inferens boleh dibuat bahawa OKT2 mempunyai pengetahuan ke atas dadah di dalam beg yang disandangnya. Saya mendapati berasaskan keterangan saksi pendakwaan F dan juga pembelaan OKT2 yang disokong oleh keterangan OKT1, saya mendapati bahawa OKT2 hanya mempunyai pemilikan pasif ke atas dadah yang ditemui di dalam beg tersebut.

[44] Whilst we are not entirely clear about what the learned High Court Judge meant by "passive possession" in the said passage, what is clear is that G he unequivocally accepted the defence of Agnish that he had no knowledge that the bag in question contained cannabis. We shall now turn to first principles of the law of possession to address the sole ground of appeal. As stated in the celebrated and oft-quoted case of *Chan Pean Leon v. PP* [1956] 1 LNS 17; [1956] 1 MLJ 237, possession in law has "a physical element and H mental element which must be present". Thomson J in the said case emphasised the vital component of knowledge in respect of possession in the following passage:

> Once possession is proved then before the accused person can be convicted it is necessary in addition to prove *mens rea*. And for this I purpose as was pointed out by Gordon-Smith Ag. CJ in the case of *Toh Ah Lam and Mak Thim v. Rex* (1949) MLJ 54, *supra*, it is necessary to prove that the person in possession knows the nature of the thing possessed.

If the thing, as in *Toh*'s case, is in a box which itself is in the possession of the accused it must be proved that he knew what was in the box. If, as in *Lee*'s case, it was a lottery document it must be proved that he knew it was a lottery document.

[45] We are mindful that under the Dangerous Drugs Act 1952, the prosecution can also rely on statutory presumption to prove knowledge once physical custody is proved (see s. 37(d)). However, in the instant case, the learned High Court Judge found that the prosecution proved possession without the aid of the presumption in s. 37(d). That is the reason the learned High Court Judge used the term "direct evidence" with respect to possession when calling for the defence of the appellants. However, once the learned High Court Judge made a finding that Agnish had no knowledge of the contents of the bag, the mental element that is essential for the offence of possession ceased to exist. What remained would be the element of physical custody which is not sufficient to prove possession in law as elucidated in *Chan Pean Leon v. PP* (*supra*).

[46] As we said earlier, it is not clear why the learned High Court Judge said Agnish was in "passive possession" after accepting his defence that he had no knowledge of the existence of the drugs in the bag. The expression "passive possession" is sometimes used in judgments dealing with drug trafficking to distinguish mere possession of drugs from possession which amounts to trafficking because of the quantity of the drugs or an overt act that falls under the trafficking definition (see *Letitia Bosman v. PP (No. 2)* [2020] 8 CLJ 252; *Konradt Prosch v. PP* [2020] 1 LNS 2065; [2021] 2 MLJ 451; and *Ong Ah Chuan v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64). However, we repeat that no finding of possession can stand if the mental element is not proved or if the presumption of knowledge is rebutted.

[47] In the premises, there is much merit in the submission of counsel for Agnish that learned High Court Judge erred in convicting his client for the offence of possession under s. 39A(2) of the Dangerous Drugs Act 1952.

Conclusion

[48] For the reasons given earlier, we found the conviction of Sri Ganesh for the offence of trafficking under s. 39B of the Dangerous Drugs Act 1952 to be safe and we unanimously dismissed the appeal. The conviction and sentence pronounced by the High Court against Sri Ganesh were affirmed.

[49] In respect of the appeal of Agnish, we found that the learned High Court Judge committed an appealable error in convicting him for the offence of possession after finding that he lacked knowledge. In the premises, we unanimously allowed his appeal and set aside the conviction and sentence that was imposed on him and in its place substituted an order of acquittal. For the same reason, the appeal of the Public Prosecutor against the sentence imposed on Agnish is dismissed.